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No._____

In The

Supreme Court of the United States

October Term, 1984

CITY OF LAWTON, OKLAHOMA, a municipal corporation; **STEVEN WERTZ;** and **KENT DUNEGAN,**

Petitoners,

vs.

SOLOMON LUSBY, VAUGHN LUSBY and **ALVIN JERARD LUSBY,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1985

QUESTIONS PRESENTED

1. QUESTION: Whether a single or isolated incident of misconduct, on the part of one (1) "off-duty" police officer acting as a private security guard, combined with the actions of two (2) "on-duty" police officers, regarding the arrest of a suspected shoplifter at a private mercantile establishment, will establish a sufficient basis to impose "official policy" liability against a municipality under the provisions of 42 U.S.C. § 1983?

2. QUESTION: Whether it is fundamentally fair for the Court of Appeals to wrench from the trial record a new, appellate finding of "official policy" liability, based on issues not pled, not considered by the trial court, not litigated by the parties and not submitted to the jury?

3. QUESTION: Whether the appellate finding of municipal liability under § 1983 (i.e., based on an official policy "of not conducting any independent investigation" of

an arrest made by a private citizen, "delegates a

nondelegable duty" and constitutes the surrender of "a state inquisitional right,") conflicts with the liability standards enunciated in Monell v. Department of Social Services, 436 U.S. 658 (1978) and related decisions?

4. QUESTION: Whether Respondents' failure to comply with the Political Subdivision Tort Claims Act (51 O.S. 1981 § 151 et seq) of the State of Oklahoma absolutely extinguished Respondents' pendent state-law tort claims of false arrest, assault, defamation, and malicious prosecution asserted against the City of Lawton and its two police officers?

LIST OF PARTIES

The only other party to this proceeding, who is not listed in the caption of this Petition, is T.G.&Y. Stores, Inc., an Oklahoma corporation. Based on information provided to them, the Petitioners believe that T.G.&Y Stores, Inc. is a wholly-owned subsidiary of Household Merchandising, Inc.

Petitioners herein believe and understand that T.G.&Y. Stores, Inc., will file a separate Petition for Writ of Certiorari in this matter on or before May 9, 1985 (See Order Extending Time, Justice White "T.G.&Y. Stores, Inc. v. Solomon Lusby, et al., A-750").

TABLE OF CONTENTS

	PAGE
Questions Presented.....	i
List of Parties.....	iii
Table of Authorities.....	v
Opinions Below.....	2
Jurisdictional Statement.....	2
Constitutional and Statutory Provisions Involved in Case.....	3
Statement of the Case.....	6
Reasons for Granting the Writ.....	10
Conclusion.....	27
Appendix A: Statutory Provisions.....	1a
Appendix B: Opinion Below [Decision of the United States Court of Appeals for the 10th Circuit].....	13a
Appendix C: Opinion Below [Denial of Petition for Rehearing entered by United States Court of Appeals for the 10th Circuit].....	53a
Appendix D: Opinion Below [Judgment based on jury verdict entered by United States District Court for the Western District of Oklahoma against Petitioners].....	55a
Appendix E: Trial Court Instructions..	57a

TABLE OF AUTHORITIES

CASES:	PAGE
Adickes v. Kress & Co., 398 U.S. 144...	17
Armstrong Cork Co. v. Lyons 366 F.2d 206, 209 n.3 (8th Cir., 1966).....	15
Baker v. McCoy, 739 F.2d 381 (8th Cir., 1984).....	11
Cowdrey v. City of Eastborough, 730 F.2d 1376, 1379 (10th Cir., 1984).....	12
Duesterhaus v. City of Edmond, 634 P.2d 720 (Okl., 1981).....	21,22 23
Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir., 1984).....	11
Graves v. Rose, 633 P.2d 733 (Okl., 1983).....	22,23, 24
Hays v. Jefferson County, 668 F.2d 869 (6th Cir., 1982).....	11
Hobson v. Wilson, 737 F.2d 1 (D.C., Cir., 1984).....	17
Horinek v. Bd. of County Comm'rs. of Kay County, 667 P.2d 479 (Okl. Ap., 1983).....	23,25

Johns v. Wynnewood Bd. of Education
656 P.2d 148 (Okl., 1982)..... 23

Lanquirand v. Hayden, 717 F.2d 220
(5th Cir., 1983)..... 11

Local 20, Teamsters, Chauffeurs &
Helpers Union v. Morton,
377 U.S. 252 (1964) 19

Losch v. Borough of Parkesburg,
736 F.2d 903 (3d Cir., 1984)..... 11

Lusby v. T.G.&Y, Stores, Inc.,
749 F.2d 1423..... 2

Maxwell v. Independent School
Dist., No. 32, Okfuskee County,
672 P.2d 1179 (Okl. App., 1983)..... 23

McClelland v. Facteau, 610 F.2d 693
(10th Cir., 1979)..... 11,12

Monell v. New York City Department of
Social Services, 436 U.S. 658,..... passim

Monroe v. Pope, 365 U.S. 167 (1961).... 17

Nashville, C. & St. L. R. Co. v. Browning
310 U.S. 352..... 17

Neal v. City of Blackwell, 670 P.2d 587
(Okl., 1983)..... 23

Oglala Sioux Tribe v. Andrus, 603 F.2d
707, 714 (8th Cir., 1979..... 15

Owen v. Haas, 601 F.2d 1242
(2d Cir., 1979)..... 12

Powe v. City of Chicago, 664 F.2d 639
(7th Cir., 1981)..... 11

Reirdon v. Wilburton Bd. of Education,
611 P.2d 239 (Okl., 1980)..... 23

Rookard v. Health and Hospitals Corp.
710 F.2d 41, 45 (2d Cir., 1983)..... 17

Ross v. City of Shawnee, 683 P.2d 535
(Okl., 1984)..... 23

Stewart v. State, 527 P.2d 22 (Okl.
Crim., 1974)..... 21

Thurman v. Rose, 575 F.Supp. 1488,
1491 n.4 (N.D. Ind., 1983)..... 17,18

Turpin v. Mailet, 619 F.2d 196
(2d Cir., 1980)..... 11

Tuttle v. City of Oklahoma City
728 F.2d 456 (10th Cir., 1984)..... 13

United Mine Workers v. Gibbs,
383 U.S. 715 (1966)..... 19

Wellington v. Daniels, 717 F.2d 932
(4th Cir., 1983)..... 11

Constitutional Provisions:

Fourth Amendment..... 3

Fourteenth Amendment..... 3

Statutes:

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 1343(3) 8

28 U.S.C. § 1652..... 4,18

42 U.S.C. § 1981..... 8

42 U.S.C. § 1983..... passim

42 U.S.C. § 1985..... 9

42 U.S.C. § 1986..... 9

22 Okla. Stat. 1981 § 187..... 4,5

22 Okla. Stat. 1981 § 202..... 5

22 Okla. Stat. 1981 § 205..... 5

22 Okla. Stat. 1981 § 1342..... 5

51 Okla. Stat. 1981 § 151..... passim

51 Okla. Stat. 1981 § 156..... passim

51 Okla. Stat. Supp. 1979 § 151..... 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The City Attorney of the City of Lawton, Comanche County, State of Oklahoma, on behalf of the City of Lawton, Steve Wertz and Kent Dunegan, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

The City of Lawton, Oklahoma, third largest city of that state, is a home-rule, charter municipality and a political subdivision of the State of Oklahoma.

OPINIONS BELOW

The November 23, 1984, opinion of the Tenth Circuit Court of Appeals is reported at 749 F.2d 1423 and appears at Appendix B hereto (App. B, infra, pp. 13a to 52a). The Order of the Court of Appeals denying a Petition for Rehearing en banc is attached hereto as Appendix C (App. C, infra, pp. 53a to 54a).

The Judgment of the United States District Court for the Western District of Oklahoma appears as Appendix D to this Petition (App. D, infra, pp. 55a to 56a) and is not reported.

JURISDICTIONAL STATEMENT

The judgment and decision of the Court of Appeals (App. B) was entered on November 23, 1984. A petition for rehearing en banc, time filed, was denied on January 9, 1985 (App. C). On the 9th day of April, 1985, Mr. Justice White extended the time for the filing of a petition for Writ of Certiorari to, and including, April 29, 1985.

Jurisdiction of this Court to review the judgment below is conferred by, and invoked under, the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

1. Constitutional Law. Involved with the issues arising from this case are certain constitutional rights found in the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Fourth Amendment reads in its entirety:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of the Fourteenth Amendment to the Federal Constitution states as follows:

> "Section 1. All persons born or naturalized in the United States,d and subject to the jurisdiction thereof, are citizens of the Udnited States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall lany State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Federal Statutory Law. Applicable to this matter are certain provisions of the Civil Rights Act of 1871, particularly 42 U.S.C., § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

In addition, the provisions of 28 U.S.C., § 1652, regarding the applicability of state law in federal proceedings, are also involved in this matter. 28 U.S.C., § 1652, states as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

3. State Statutory Law. Statutory laws of the State of Oklahoma bearing on this case are three (3) statutes dealing with the authority of private citizens to make arrests, to wit: 22 Okla. Stat. 1981, §§ 187, 202 and 205. Section 187 of Title 22 Okla. Stat. 1981 reads:

> "An arrest may be either:

1. By a peace officer, under warrant,

2. By a peace officer without a warrant; or,

3. By a private person."

22 Okla. Stat. 1981, § 202, states:

"A private person may arrest another:

1. For a public offense committed or attempted in his presence.

2. When the person arrested has committed a felony although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

22 Okla. Stat. 1981, § 205, provides:

"A private person who has arrested another for the commission of a public offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer."

Regarding the authority of a law enforcement officer to arrest a person reasonably suspected of stealing merchandise from retailers or wholesalers, 22 Okla. Stat. 1981, § 1342, states as follows:

"Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner."

Finally, appearing as Appendix A to this Petition are the provisions of 51 Okla. Stat. Supp. 1979, § 151 et seq, commonly referred to as "The Political Subdivision Tort Claims Act" of the State of Oklahoma. The statutory language found in Appendix A is the act as it existed on July 1, 1979, and during the period that Respondents' state law claims accrued. Presently, this same statutory provision is now codified as 51 Okla. Stat. 1981, § 151 et seq.

STATEMENT OF THE CASE

Invoking the prophetic observations of Mr. Justice Powell in his concurring opinion in Monell v. Department of Social Services, 436 U.S. 658, "difficult question" continues to remain and:

> There are substantial line-drawing problems in determining" when execution of a government's policy or custom" can be said to inflict constitutional injury that "government as an entity is responsible under § 1983" 436 U.S. 658 at 714.

Petitioners herein, City of Lawton, Oklahoma, a municipal corporation ("Lawton" or "City") and two of its police officers, Steve Wertz ("Wertz") and Kent Dunegan ("Dunegan") respectfully present this matter for the purpose of

resolving some of the "difficult questions" that continue to abound after the Monell decision.

This case arises out of an incident which occurred on July 6, 1979, in a variety or general merchandise store in Lawton, Oklahoma, owned and operated by T.G.&Y Stores, Inc. ("T.G.&Y."). T.G.&Y. also brings a separate Petition for Certiorari. After a T.G.&Y. security guard (who was an off-duty police officer) requested a receipt for a pair of sunglasses, a struggle ensued, resulting in the arrest of all three Respondents. After their detention or arrest at the store, Respondents were transported to the Lawton City Jail by two (2) on-duty police officers, Petitioners Wertz and Dunegan.

The Respondents originally filed their Complaint in the United States District Court for the Western District of Oklahoma on June 23, 1980, alleging numerous theories of recovery. The Complaint also charged that the T.G.&Y. security guard, the City and its officers had singled out members of Lawton's Black community for physical and mental harassment. Further,

Respondents claimed that City of Lawton, Oklahoma, was negligent in its training, selection, education, and discipline of its police officers and that this condition arose to the status of a "municipal policy" for which the City was liable. It was further alleged that these Petitioners were also liable to Respondents for pendent state claims involving false arrest, assault, defamation, and malicious prosecution.

The Respondents charged that recovery was appropriate pursuant to 42 U.S.C. § 1983. The trial court jurisdiction over matters asserted by Respondents was based on the provisions of 28 U.S.C. § 1343(3) and the doctrine of pendent jurisdiction.

Respondents, until submission of the case to the jury, asserted that Petitioners and T.G.&Y. were racially motivated in their action toward Respondents and actually asserted a claim under 42 U.S.C. § 1981. However, these § 1981 claims were never successfully developed by Respondents and were abandoned by them. Similarly, Respondents' claims of conspiracy based on 42

U.S.C. §§ 1985, 1986 did not bear fruit. Although conspiracy issues were submitted to the jury, the jury retained verdicts in favor of all defendants (Petitioners) on the issue of conspiracy.

The trial court submitted seven theories of liability to the jury as to each Respondent. As to Respondent Solomon Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest, and the malicious prosecution claim. As to Respondent Vaughn Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest claim, the assault and battery claim and the malicious prosecution claim. As to Respondent Alvin Lusby, the jury returned a verdict for liability on the § 1983 claim, the false arrest claim and the malicious prosecution claim. A more descriptive treatment of the jury verdicts is found in the Court of Appeals Opinion, affirming the jury verdict. (App. B. pp. 15a-16a).

There was no showing or evidence at trial that any incident similar to this particular event had occurred in the past. Further, the municipal liability of the Petitioner Lawton

was restricted to allegations of failure to properly hire, train, or supervise its police employees. Restriction of Lawton's liability to these issues is unequivocally born out by the liability issue regarding Lawton which was submitted to the jury. (App. E)

REASONS FOR GRANTING THE WRIT

1. The Question of a "Single Incident" Providing a Basis for Municipal Liability Under § 1983 Has Yet to Be Decided by This Court; the Decision Below Conflicts with Decisions of Other Circuit Courts on This Same Issue.

As indicated in the Statement of the Case (above) and the Tenth Circuit's Opinion (App. B), there exists no finding that prior indicents of a similar nature had occurred at the T.G.&Y. store--or any other mercantile establishment in the City of Lawton, Oklahoma. Certainly, no such prior incidents were urged by the Respondents, nor were any such previous occurrences cited by the trial or appellate courts. Indeed, there was no proof that prior to this incident an alleged shoplifter had ever been arrested by an off-duty police officer at

the T.G.&Y. store. Everything tends to show that this was an isolated, single incident.

From reported decisions a general proposition on § 1983 liability imposed on local governments (or supervisory officials) emerges: a single act or isolated incident is insufficient to establish liability. Turpin v. Mailet, 619 F.2d 196 (2d Cir., 1980) cert. den. 449 U.S. 1016; Losch v. Borough of Parkesburg, 736 F.2d 903 (3d Cir., 1984); Wellington v. Daniels, 717 F.2d 932 (4th Cir., 1983); Lanquirand v. Hayden, 717 F.2d 220 (5th Cir., 1983); Hays v. Jefferson County, 668 F.2d 869 (6th Cir., 1982); Powe v. City of Chicago, 664 F.2d 639 (7th Cir., 1981); Baker v. McCoy, 739 F.2d 381 (8th Cir., 1984); McClelland v. Facteau, 610 F.2d 693 (10th Cir., 1979); and Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir., 1984). Petitioners submit that the Court of Appeals decision in this case irreconcilably conflicts with persuasive authority holding that an isolated event does not create "policy liability" in a § 1983 matter.

Interestingly, the Circuit Opinion hereto attached is strangely silent with regard

to prior decisions on the matter from its own Tenth Circuit. McClelland v. Facteau, supra. In the recent case of Cowdrey v. City of Eastborough, 730 F.2d 1376 (10th Cir., 1984), the Tenth Circuit opined that an "isolated instance of police misconduct without more is not sufficient to raise a fact issue whether the alleged constitutional violation was caused... by any other official act or omission." 730 F.2d 1376, 1379. It is submitted that this Court, applying the Tenth Circuit's own pronouncements, should reverse this matter.

Most importantly, these Petitioners know of only two appellate decisions that have determined a "single" or "isolated" incident might serve as basis for the imposition of corporate or municipal liability under a § 1983 action. In Owen v. Haas, 601 F.2d 1242 (2d Cir., 1979) cert. den. 444 U.S. 980, it was held where a group of seven (7) prison guards, some of them supervisors, savagely beat a prisoner, that municipal liability might be imposed for lack of training based on a "single brutal incident."

The second matter, as with this case, comes form the Tenth Circuit and the very same (Western District of Oklahoma) trial court, namely: Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir., 1984) cert. granted __U.S.__, 105 S.Ct. 79, 83 L.Ed.2d 27. In the Tuttle case, it was held that recovery against the municipal employer was possible based on a "single incident" when the facts demonstrate a complete lack of training.

As above noted, this court has already granted certiorari in the Tuttle case (No. 83-1919). These Petitioners submit that this matter should also be accepted by the Court in order to fully access the "single incident" rule under the contrasting facts of this instant case versus the circumstances present in the Tuttle case.

2. The Opinion of the Tenth Circuit Creates Its Own Appellate "Official Policy" and Adjudges Petitioner Lawton Liable Without Trial--the Appellate-Made Policy Was not Considered by the Trial Court, Was Not Litigated by the parties and Was Not Submitted to the Jury.

Without doubt the most interesting passage of the Court of Appeals Opinion in this matter is the following:

> "...we need not consider whether the city's policies for supervising and disciplining its police officers amounted to an unconstitutional procedure, or whether allegations of police officer brutality sufficed to establish a pattern of such misconduct. (App B,

In view of mountains of discovery, in view of the expenditure of vast sums on approximately twenty (20) depositions, in view of an eight (8) day trial, in view of an 1800 page trial transcript, in view of the arguments of counsel, and in view of the court's instructions to the jury, the above passage is more than incredible. This was the precise issue of l bility regarding City submitted to the jury by the trial court. (App. E)

Evidently, the Tenth Circuit determined that Respondents' attempt to prove municipal liability based on lack of supervision, lack of training, prior misconduct, etc., was a total failure. However, City begs this Court to read Instruction No. 15 regarding the liability of the City for § 1983 claims given at trial (App. E). What were the jury issues on City's

liability: negligent training, failure to supervise and police misconduct. For whatever Respondents' evidence amounted to, all of it dealt with training-supervision-misconduct issues. With respect to the Petitioner Lawton's liability, that was what this case was about. It was not about: "an impermissible city policy that delegates a non-delegable duty." (App. B)

City is fully aware that "theory of the pleadings" or "theory of action" doctrines have been effectively abolished by the Federal Rules of Civil Procedure. However, fundamental fairness and due process are not abolished. The shifting of legal issues from one to another is limited and must stop when it prejudices the opposing party. Armstrong Cork Co. v. Lyons, 366 F.2d 206, 209 n.3 (8th Cir., 1966); Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 714 (8th Cir., 1979); Wright & Miller, Federal Practice and Procedure §§ 1219 (pp. 141-143) and § 2662 (p. 133).

This appellate created municipal liability "goes too far" and works to the severe prejudice of City. Petitioner City submits that, given fair notice and fair opportunity to respond to the context of this "appellate" finding of municipal liability, City might well demonstrate that the "appellate policy" is constitutional, or, at least totally neutral. Alas, City has not been given a chance.

3. The Appellate Court's Finding of Municipal Liability Conflicts with Principles Previously Announced in Monell and Related Cases.

Monell, supra, held that liability attaches to a municipality "...when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." The official policy or custom must be the "moving force" of the constitutional violation. Custom has been defined as "the settled practices of

state officials which transform private predilections into compulsory rules of behavior no less than legislative pronouncements." Adickes v. Kress & Co., 398 U.S. 144; Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 352.

In order for liability to exist, the series of events must be attributed to either Lawton's governing body or an official to whom that body had delegated policy-making authority. Hobson v. Wilson, 737 F.2d 1 (D.C. Cir., 1984); Rookard v. Health and Hospitals Corp., 710 F.2d 41, 45 (2d Cir., 1983).

4. State law articulated by State Courts controls pendent state tort claims attached to a federal claim brought under § 1983.

From the time of its enactment, and then for almost ninety years, the provisions of 42 U.S.C. § 1983 laid moribund. Not until this Court rendered its decisions in Monroe v. Pope, 365 U.S. 167 (1961), and Monell, supra, did § 1983 attain its present status as a substantial contributor to the federal civil caseload. [Statistical information revealing a "swelling tide of § 1983 actions" threatening to "engulf the federal courts" is found in Thurmon v.

Rose, 575 F.Supp. 1488, 1491 n.4 (N.D. Ind., 1983).] With the increase in § 1983 litigation, pendent state claims--usually common law torts based on the same operative facts as give rise to the constitutional claim--have also experienced a similar increase.

Today, in the § 1983 litigation involving actions of a municipal police department (as in the instant case) it is not unusual for the defendants to face a whole host of state torts: assault, battery, malicious prosecution, false arrest, libel, false imprisonment, slander, and intentional infliction of emotional harm. As a result, jury instructions at trial, dealing with both federal and state claims, may state seven or eight grounds of liability based on the same set of operative facts.

It is beyond dispute that state law governs the assertion of state law claims which are pendent to federal litigation. 28 U.S.C. § 1652. In the instant case, because Petitioners are a municipal government and two of its police officers, a special Oklahoma

statute applies, namely: "The Political Subdivision Tort Claims Act," 51 Okla. Stat. 1981 § 151 et seq. (App. A), hereinafter called "Tort Claims Act." In the exercise of pendent jurisdiction, federal courts are bound to apply state law. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). A state law pendent claim asserted in federal court must be treated and determined as if the same were asserted in the state tribunal. This indisputable principle is strongly stated in Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252 (1964) at 257:

> "Pendent jurisdiction permits a federal court under some circumstances to determine a state cause of action which otherwise would have to be heard in the state court. Hurn v. Oursler, supra. But if the state court would be without authority to award damages under state law, then the doctrine of pendent jurisdiction can give "the District Court...no greater power to do so." Lauf v. Shineer & Co., 303 U.S. 323, 328 82 L.Ed. 872, 877, 58 S.Ct. 578.

The question evolves: Would an Oklahoma tribunal reach the same determination, as Tenth Circuit Court, that Respondents had substantially complied with the notice requirements of 51 O.S. 1981 §156? (App. A, pp. 5a-6a) The City of Lawton respectfully submits that an

Oklahoma tribunal, applying the appropriate Oklahoma law, would reach a totally opposite conclusion, namely: no compliance (substantial or otherwise) with state law provisions requiring written notice of tort claims against political subdivisions or their employees.

Regarding compliance with state law notice provisions, the City of Lawton takes issue with the Court of Appeals characterization of Gent and Hargraves as "Lawton City employees" when they attempted to secure a civil release of liability for their off-duty employer, T.G.&Y. Stores. (App. B, p. 41) A release running in favor of T.G.&Y. Stores was of no earthly use to the City of Lawton.

Petitioner City of Lawton is mindful that an off-duty police officer may well be a state actor for § 1983 purposes. However, the gaping flaw in the Court of Appeals Opinion is failure to address state law--Oklahoma decisions that must be followed in disposing of these pendent state claims. For a beginning, Oklahoma law treats an off-duty officer who undertakes employment as a private citizen, representing only the private interests of his

private employer. Stewart v. State, 527 P.2d 22 (Okl. Crim., 1974) Stewart specifically holds:

> "We therefore hold that as a matter of law when an off-duty police officer accepts private employment and when engaged in this private employment he becomes a private citizen...."

It is undisputed that both individuals (Gent and Hargraves) mentioned in the Court of Appeals Opinion were "off-duty" when these events occurred. Petitioner submits that the Opinion's characterization of these two men as "Lawton City employees" for purposes of compliance with the notice provisions of the Tort Claims Act is not only clearly, but totally, erroneous. No one would seriously argue that giving notice to a "private citizen" is substantial compliance with 51 O.S. 1981 § 156.

The Tenth Circuit Opinion cites Duesterhaus v. City of Edmond, 634 P.2d 720 (Okl., 1981), in support of the proposition that substantial compliance has been accepted by the Oklahoma Supreme Court. City grants that. However, in Duesterhaus notice was given to a high managerial official, i.e., the City Attorney. It was not given to two off-duty police

officers acting as private citizens for their private employer. Indeed, Duesterhaus explicitly requires that the "substantially complied" notice be given to a supervisory or management employee, 634 P.2d 720, 722. Without putting the information in the right hands, how can the purposes of the statute (investigation, repairs, settlement and financial planning) be fulfilled? In Graves v. Rose, 633 P.2d 733 (Okl., 1983), notice of claim given to an "on-duty" bus driver, involved in an accident while driving a school bus, was held not to constitute substantial compliance. Surely, the Oklahoma Supreme Court would give no different ruling where two "off-duty" police officers received notice while working for the "off-duty" employer.

City submits that each of three (3) factors must exist before a claimant can be held to have substantially complied with 51 O.S. 1981, § 156 (App. A, pp. 5a-6a): (1) the notice must be given to a supervisory or managerial employee; (2) the substituted notice must be timely given, i.e., within the 120-day period set by § 156; and (3) the notice must be

a claim for or demand for compensation and not merely notice or knowledge of an injury or incident. These factors are distilled from the following Oklahoma cases: Reirdon v. Wilburton Bd. of Education, 611 P.2d 239 (Okl., 1980); Duesterhaus, supra; Johns v. Wynnewood Bd. of Education, 656 P.2d 148 (Okl., 1982); Graves, supra; Horinek v. Bd. of County Comm'rs. of Kay County, 667 P.2d 479 (Okl. App., 1983); Neal v. City of Blackwell, 670 P.2d 587 (Okl., 1983); Maxwell v. Independent School Dist. No. 32, Okfuskee County, 672 P.2d 1179 (Okl. App., 1983); and Ross v. City of Shawnee, 683 P.2d 535 (Okl., 1984).

In every (Reirdon and Duesterhaus) case where substantial compliance was found by Oklahoma decisions involving § 156, all three (3) of the above mentioned factors were present. In every case above cited, ruling that the claim was barred for failure to comply with § 156, namely, Johns, Graves, Horinek, Neal, Maxwell, and Ross, at least one of these three (3) determining factors was absent.

Just what affirmative action did the Respondents Lusby take to give notice (strict,

substantial, or any at all), in a timely manner, to a supervisory or managerial City employee that they claimed monetary compensation from the Petitioners City, Wertz, and Dunegan? None. The record in this proceeding is totally devoid of any matter showing compliance, or even attempted compliance, with the state notice requirements. The Opinion of the Tenth Circuit expressly states that the Respondents (Lusbys) did not give written notice before filing suit. (App. B) The first, the initial written claim of the Respondents was their federal complaint filed June 23, 1980.

Petitioner City of Lawton submits that the clear import of the above Oklahoma case law makes the Tort Claims Act a substantive statute of limitations. Therefore, the giving of notice, or proving substantial compliance therewith, is an essential element of the cause of action. "No action for any cause arising under this Act shall be maintained unless valid notice has been given...." 51 O.S. 1981 § 156(c) (App. A, p. 5a) The Appellate Opinion assertion that "§ 156(b) does not bar plaintiffs' pendent claims" (App. B, p. 42a) is just

plain wrong in light of § 156(c). Further, the Tenth Circuit's reference to the fact that Respondent's pendent malicious prosecution claims did not arise until their dismissal on February 17, 1980, is interesting but pointless. Giving notice "by filing suit" does not constitute compliance with the Tort Claims Act and specifically contravenes 51 O.S. 1981 §§ 156(b), 156(c), and 157. Graves, supra, 633 P.2d 733, 734; Horinek, supra 667 P.2d 479, 480.

Finally, considering the "lump sum" verdict in this case (App. B, pp. 15a-16a), it is apparent that it reflects findings of liability on state torts that should have never been submitted to the jury. Under the Tort Claims Act, the federal court had no jurisdiction over these state claims asserted against the City, Wertz and Dunegan.

Clearly, the Tenth Circuit is stretching Oklahoma law--to the point of ignoring the same--in order to protect the tainted and flawed verdict. Sixty-seven percent (67%) of

the constituent issues (false arrest and malicious prosecution) composing the total liability of Petitioners City, Wertz and Dunegan to Respondent Solomon Lusby are based on barred state claims. Fifty percent (50%) of the constituent issues (malicious prosecution) composing these Petitioners' total liability to Respondent Vaughn Lusby are based on barred state claims. Seventy-five percent (75%) of the constituent issues (assault, false arrest and malicious prosecution) composing these Petitioners' total liability to Respondent Alvin Lusby are based on barred state claims. Petitioners did all they could to prevent this situation: the trial court should have upheld these Petitioners' motion to dismiss Respondents' state law claims for failure to plead compliance with the Tort Claims Act. And, further, the trial judge should have sustained Petitioners' motion for a directed verdict on these state law claims at close of plaintiffs' evidence, and the close of all evidence, for failure to prove compliance with the Tort Claims Act.

Petitioners submit that Oklahoma decisional and statutory authorities unequivocally demonstrate that Respondents' state law claims are barred, divesting the federal trial court of all jurisdiction over the same. Be there any doubt, Petitioners stand ready to move that this particular state law question be certified to the Supreme Court of the State of Oklahoma.

CONCLUSION

For the above stated reasons, it is urged by these Petitioners that this Petition for Certiorari should be granted.

Respectfully submitted,

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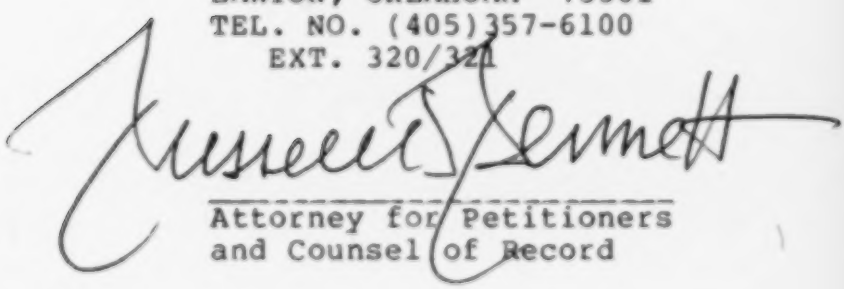

Attorney for Petitioners
and Counsel of Record

APPENDIXES

APPENDIX A: STATE STATUTORY PROVISIONS

POLITICAL SUBDIVISION TORT CLAIMS ACT OF THE STATE OF OKLAHOMA

Title 51, Okla. Stat. Supp. 1979 §§151 to 166, inclusive, and §170 [as amended and in effect on July 1, 1979; and effective at the time of the accrual of Respondents' (Lusby brothers) pendent state claims].

§ 151. Short Title.--This act shall be known and may be cited as "The Political Subdivision Tort Claims Act."

§ 152. Definitions.--As used in this act:

1. "Agency" means any board, commission, committee, department or other instrumentality or entity designated to act in behalf of a political subdivision.

2. "Employee" means any person who is acting or who has acted in behalf of a political subdivision or an agency whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis. Employee also includes all elected or appointed officers, members of governing bodies and other persons designated to act for an agency or political subdivision, but shall not include independent contractors.

3. "Loss" means injury or death of a person or damage to real or personal property.

4. "Municipality" means any incorporated city or town, and all institutions, agencies or instrumentalities of a municipality.

5. "Scope of employment" means an employee was acting in the performance of the duties of the office or employment or was performing tasks lawfully assigned by a competent authority.

6. "Political subdivision" means:

a. a municipality;
b. a school district;
c. a county; or
d. a public trust where a city, town, school district or county is a beneficiary;

and all their institutions, instrumentalities or agencies.

§ 153. Liability--Scope--Exemptions.--Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of corruption or fraud of the employee.

§ 154. Extent of liability.--**A.** The liability of a political subdivision or an employee on claims within the scope of this act shall not exceed:

1. Twenty-five Thousand Dollars ($25,000.00) to any claimant for any number of claims for damage to or destruction of property, including consequential damages arising out of a single accident or occurrence;

2. Fifty Thousand Dollars ($50,000.00) to any claimant for all other claims arising out of a single accident or occurrence; or

3. Three Hundred Thousand Dollars ($300,000.00) for any number of claims arising out of a single occurrence or accident.

B. No award for damages on any claim against a political subdivision or employee shall include punitive or exemplary damages. The limitation imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

C. When the amount awarded to or settled upon multiple claimants exceeds the limitations

of this section, any party may apply to the district court which has jurisdiction of the cause to apportion to each claimant his proper share of the total amount limited herein. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising out of the occurrence.

§ 155. Exemptions from liability.--A political subdivision or an employee acting within the scope of his employment shall not be liable if a loss results from:

1. Legislative functions;

2. Judicial or quasi-judicial functions;

3. Execution or enforcement of the lawful orders of any court;

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to any charter provision, ordinance, resolution, rule, regulation or written policy;

5. Performance or the failure to exercise or perform any act or service which is in the discretion of the political subdivision or its employees;

6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police or fire protection;

7. Any claim based on the theory of attractive nuisance;

8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of a political subdivision.

9. Entry upon any property where that entry is expressly or impliedly authorized by law;

10. Natural conditions of unimproved property of the political subdivision;

11. Assessment or collection of taxes or special assessments;

12. Licensing powers or functions including,but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority where the authority is discretionary under law;

13. Inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, or any property other than the property of the political subdivision to determine whether the property complied with or violates any law or contains a hazard to health or safety;

14. Any claim covered by the Oklahoma Workers' Compensation Act (Section 1 et seq. of Title 85) or any claim covered by the Oklahoma Unemployment Compensation Act; (Section 211 et seq. of Title 40)

15. Absence, condition or malfunction of any traffic or road sign, signal or warning device unless the absence, condition or malfunction is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties except on failure of the political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising from the failure of any political subdivision to initially place any of the above signs, signals or warning devices when such failure is the result of a discretionary act of the political subdivision. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;

16. Any claim which is limited or barred by any other law or which is for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages;

17. Misrepresentation, if unintentional;

18. An act or omission of a person other than an employee;

19. Theft by a third person of money in the custody of an employee unless the loss was sustained because of the negligence or wrongful act or omission of the employee; or

20. Participation in or practice for any interscholastic athletic contest.

§ 156. Claims--Petition--Limitation of actions--Notice--Wrongful death.--A. Any person having a claim against a political subdivision or an employee within the scope of this act shall petition the political subdivision for any appropriate relief including the award of money damages.

B. A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with the clerk of the governing body of the political subdivision within one hundred twenty (120) days after the loss occurs.

C. The written notice of claim shall state the time, place and circumstances of the claim and the amount of compensation or other relief demanded. Failure to state either the time, place, circumstances and amount of compensation demanded shall not invalidate the notice unless the claimant declines or refuses to furnish such information within ninety (90) days after demand by the political subdivision. No action for any cause arising under this act shall be maintained unless valid notice has been given and the action is commenced within six (6) months after notification of denial of the claim by the clerk of the political subdivision. The time for giving written notice of claim does not include the time during which

the person injured is unable due to incapacitation from the injury to give such notice, not exceeding ninety (90) days of incapacity.

D. When the claim is one for death by wrongful act or omission, notice may be presented by the personal representative, surviving spouse or next of kin or other legal representative or the consular officer of a foreign country of which the deceased was a citizen, within one (1) year after the alleged injury or loss resulting in such death. Provided, however, if the person for whose death the claim is made has presented notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

§ 157. Notice of approval or denial of claim.--Within ninety (90) days after receiving the filing of a claim, the clerk of the political subdivision shall notify the claimant in writing of the approval or denial of the claim. A claim is denied if the political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the interested parties have reached a settlement before the expiration of that period. A person may not initiate a suit against a political subdivision or employee whose conduct gave rise to the claim unless the claim has been denied in whole or in part.

§ 158. Settlement or defense of claim--Effect of liability insurance.--A. The political subdivision, after conferring with authorized legal counsel, may settle or defend against a claim or suit brought against it or its employee under this act subject to any procedural requirements imposed by statute, ordinance, resolution or written policy, and may appropriate money for the payment of amounts agreed upon. When the amount of any settlement exceeds Two Thousand Five Hundred Dollars ($2,500.00), the settlement shall not be effective until approved by the district court and entered as a judgment as provided by law.

B. If a policy or contract of liability insurance covering the political subdivision or

its employees is applicable, the terms of the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, payment and defense of claims or suits against the political subdivision or its employees covered by the policy. However, the insurer may not enter into a settlement for an amount which exceeds the insurance coverage without the approval of the governing body of the political subdivision or its designated representative if the political subdivision is insured.

C. Nothing in this section shall be construed to repeal or modify Sections 361 through 365.6 and 435 of Title 62 of the Oklahoma Statutes and it is intended that this section be construed in conformance with those sections.

§ 159. Enforcement of judgments.--A. Judgments recovered against political subdivisions under the provisions of this act shall be enforced in the same manner and to the same extent as judgments are now enforced against such political subdivisions under the law except as herein provided.

B. If the judgment is obtained against a political subdivision that has procured a contract or policy of liability or indemnity insurance protection, the holder of the judgment may use the methods of collecting the judgment which are provided by the policy or contract or law to the extent of the limits of coverage provided.

C. For the payment of any judgment obtained under the provisions of this act against a political subdivision that is a self-insurer or not fully covered by liability insurance, the manner of paying a money judgment shall be as follows. Proof of indebtedness, as required in Sections 263 through 364 of Title 62 of the Oklahoma Statutes and evidence of any estimated tax levy or increases necessary to reimburse the sinking fund for the purposes of the judgment as provided in Section 431 of Title 62 of the Oklahoma Statutes, and other evidence or statements which the court may require, shall

be made to the court before final judgment is rendered. As an alternative to paying the money judgment out of the sinking fund at the rate of one-third (1/3) each year, the court, based on consideration of evidence and proof, may provide for the judgment to be paid over a period of not less than one (1) nor more than ten (10) years. The interest rate on any judgment when payment is extended more than three (3) years shall be at the rate prescribed by law for the first three (3) years and at the rate of six percent (6%) for each remaining year.

§ 160. Injuries for which political subdivision liable--Recovery of payments--Limitation of actions.--A political subdivision shall be liable for injury or damage proximately caused by an act or omission of an employee within the scope of his employment if the act or omission would, except as otherwise provided herein, have given rise to a cause of action against the employee or his personal representative. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of fraud or corruption of the employee, nor for any punitive or exemplary damages against an employee, nor for payment of any costs, judgments or settlements which are paid through an applicable contract or policy of insurance. The political subdivision shall have the right to recover any payments made by it for any judgment, or portion thereof, and costs or fees by or on behalf of an employee's defense if the employee fails to cooperate in good faith in the defense of the claim or action. A judgment or settlement in an action or claim under this act shall constitute a complete bar to any action by the claimant against an employee whose conduct gave rise to the claim resulting in that judgment or settlement.

§ 161. Duty to defend, save harmless and indemnify employees--Payment of settlements and judgments.--A. The governing body of a political subdivision shall defend, save harmless and indemnify any of its employees against any tort claim or other demand, regardless of the merits of the claim arising out of an alleged act or

omission occurring within the scope of employment.

B. The political subdivision shall pay or cause to be paid any judgment or settlement against an employee for any claim or action in the manner provided by Sections 8 and 9 of this act (Sections 158, 159 of this title) if:

1. The act or omission upon which the settlement or judgment is based occurred within the scope of the employee's employment;

2. The employee's conduct which gave rise to the claim resulting in the judgment or settlement was not because of fraud or corruption of the employee; and

3. The employee reasonably cooperated in good faith in the defense of the claim or action.

If the above requirements are met, an employee may recover payments made by him for any settlement or judgment against him or any portion thereof and any costs or fees incurred by or on behalf of his defense. Nothing in this section shall be construed to authorize a political subdivision to pay for any punitive or exemplary damages rendered against an employee, nor to allow a political subdivision to pay for any judgment, settlement, costs or fees which are paid or covered by any applicable policy or contract of insurance.

§ 162. Constitutional or statutory rights, privileges or immunities--Violation by employee--Defending--Indemnification--Right of recovery--Punitive or exemplary damages.--A. A political subdivision, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, shall:

1. Provide a defense for any employee when liability is sought for any violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States when alleged to have been committed by the employee while acting within the scope of employment; and

2. Pay or cause to be paid any judgment entered against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against any employee; and any costs or fees for a violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of employment.

B. A political subdivision shall have the right to recover from an employee the amount expended by the political subdivision to provide a defense, or pay a settlement agreed to by the employee and the political subdivision, or pay the final judgment, if it is shown that the employee's conduct which gave rise to the action was fraudulent or corrupt or if the employee fails to reasonably cooperate in good faith in defense of the action.

C. Nothing in this section shall be construed to authorize a political subdivision to pay for any punitive or exemplary damages rendered against an employee, nor to allow the political subdivision to pay for any defense, judgment, settlement, costs or fees which are paid or covered by any applicable policy or contract of insurance.

§ 163. Venue--Parties--Service of process--Evidence of Insurance.--Actions against all political subdivisions or their employees within the scope of this act shall be brought in the county in which the situs of the political subdivision is located or in the county in which the cause of action arose. Suits instituted pursuant to the provisions of this act shall name as defendant the political subdivision against which liability is sought to be established. In suits against political subdivisions the petition and summons shall be served in the manner prescribed by law for civil cases generally. If no method is prescribed by law, then service may be had on the administrative head of the political subdivision being sued, if available, and if not, the

court in which the suit is pending may authorize service in such manner as may be calculated to afford the political subdivision a fair opportunity to answer and defend the suit. No attempt shall be made in the trial of any action brought against any political subdivision or employee within the scope of this act to suggest the existence of any insurance which covers in whole or in part any judgment or award which may be rendered in favor of the plaintiff.

§ 164. Application of Oklahoma laws and statutes and rules of procedure.--The laws and statutes of the State of Oklahoma and the Rules of Civil Procedure, as promulgated and adopted by the Supreme Court of Oklahoma insofar as applicable and to the extent that such rules are not inconsistent with the provisions of this act, shall apply to and govern all actions brought under the provisions of this act.

§ 165. Exempt claims.--This act does not apply to any claim against any political subdivision or employee arising before the effective date of this act. Any such claim may be presented and enforced to the same extent and subject to the same procedures and restrictions as if this act had not been adopted.

§ 166. Governmental and proprietary functions of political subdivisions--Application of act.--The distinction existing between governmental functions and proprietary functions of political subdivisions shall not be affected by the provisions of this act; however the provisions of this act shall apply to both governmental and proprietary functions.

§ 167. Insurance.--Omitted.

§ 168. School districts--Insurance.--Omitted.

§ 169. Counties--Insurance.--Omitted.

§ 170. Application of laws.--This act is exclusive and supersedes all home rule charter provisions and special laws on the same subject

heretofore, and all acts or parts of acts in conflict herewith are repealed.

APPENDIX B: OPINION BELOW

Decision of the United States Court of Appeals for the Tenth Circuit

filed November 23, 1984, and reported 749 F.2d 1423 (1984)

[NOTE: footnotes are set out as endnotes and follow the text of the opinion]

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 & 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON, OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-80-751-W)

Russell D. Bennett, City Attorney, (Gerald S. Rakes, Assistant City Attorney, with him on the briefs), Lawton, Oklahoma, for Defendants-Appellants City of Lawton, Steve Wertz, and Kent Dunegan.

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Michael W. Hinkle (Page Dobson and Ronald R. Hudson with him on the briefs) of Holloway, Dobson, Hudson & Bachman, Oklahoma City, Oklahoma, for Defendants-Appellants T.G.&Y. Stores, Inc., and Charles Gent.

Gretchen A. Harris (Jack LUSBY. Kinzie, also of Andrews Davis Legg Bixler Milsten & Murrah, Oklahoma City, Oklahoma, and Linda G. Scoggins of Spradling, Alpern, Friot & Gum, Oklahoma City, Oklahoma, with her on the briefs) for Plaintiffs-Appellees.

Before LOGAN and McWILLIAMS, Circuit Judges, and CAMPOS, District Judge.*

LOGAN, Circuit Judge.

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*Honorable Santiage E. Campos, United States District Judge for the District of New Mexico, sitting by designation.

These appeals arise out of judgments in favor of plaintiffs Solomon Lusby, Vaughn Lusby, and Alvin Lusby--three brothers--who asserted civil rights and pendent state tort claims against the City of Lawton, Oklahoma, two of its police officers, Kent Dunegan and Steve Wertz, T.G.&Y. Stores, Inc., and Charles Gent, another Lawton police officer who was serving while off-duty as a security guard at a T.G.&Y. store in Lawton at the time of the disputed incidents. The jury returned a verdict for all plaintiffs on their 42 U.S.C. § 1983 claims against each of the defendants. On the pendent claims there were differences in the verdicts: on false arrest Solomon and Alvin won against all defendants although Vaughn won only against Gent and T.G.&Y.; on malicious prosecution Solomon and Alvin received a verdict only against Wertz, Dunegan, and the city, and Vaughn succeeded only against Gent and T.G.&Y.; on assault and battery only Alvin prevailed and only against Wertz. The verdict form did not require the jury to separate damages on the particular claims, except among the categories actual, nominal, and punitive. The judgments

against each defendant were as follows (all actual damages except as indicated):

	Solomon	Vaughn	Alvin
Gent	$1,000	$ 3,000	$ 2,000
T.G.&Y.	4,000	16,000 & 50,000 punitive	
Wertz	2,000	1,000	2,000
Dunegan	2,000	1,000	1,000
City of Lawton	6,000	4,000	10,000

The jury found for the plaintiffs on defendant Gent's counterclaim for assault and battery. The trial court entered judgment on the verdicts and awarded attorney's fees to plaintiffs pursuant to 42 U.S.C. § 1988.

The city and police officers Wertz and Dunegan appeal, contending that the trial court erred (1) in failing to grant a directed verdict in favor of the city and the officers on the §1983 claims; and (2) in refusing to dismiss the pendent claims because plaintiffs did not comply with the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§ 151-170. Gent and T.G.&Y. appeal separately, arguing that the trial court erred (1) in refusing to instruct the jury on the qualified

immunity Gent asserted as a defense to the § 1983 claims; (2) in permitting the jury to find that T.G.&Y. and Gent acted under color of state law for purposes of § 1983; (3) in permitting the jury to assess punitive damages against T.G.&Y.; (4) in allowing plaintiffs to introduce evidence of Gent's character from his police personnel file; and (5) in instructing the jury regarding damages for future medical expenses and loss of earning capacity. Additionally, all defendants contend that the trial court erred in awarding attorney's fees in excess of the amount provided under plaintiffs' contingent fee agreement with their attorneys.

I

This dispute arose when plaintiffs stopped at a T.G.&Y. store in Lawton, Oklahoma, on July 6, 1979. Vaughn Lusby and Alvin Lusby entered the store and Vaughn selected a pair of sunglasses. Substantial evidence supports the jury's implicit finding that Vaughn went through the checkout line and paid for the sunglasses, and then decided to return to buy some hairspray. Carrying the sunglasses, Vaughn entered the checkout line again and paid for

the hairspray. David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses, but not paying for them. Jamison summoned Charles Gent, an off-duty Lawton police officer employed by T.G.&Y. as a plain clothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him for the receipt for the sunglasses. Vaughn explained that he had paid for the glasses but had lost the receipt. Gent showed Vaughn his badge and told him that he was a Lawton police officer acting as a security guard and that Vaughn was under arrest for shoplifting. Gent and Vaughn went back inside the store to pursue the matter.

Two altercations then occurred, the precise details of which the parties dispute. Upon reentering the store Gent immediately sought to escort Vaughn to a back room. On the way to the rear of the store Vaughn stopped and raised his voice, apparently in an attempt to get the cashier's attention. Gent grabbed Vaughn around the throat using a chokehold. Vaughn struggled to loosen Gent's grip; then Gent and

other T.G.&Y. employees pinned Vaughn. Solomon and Alvin, having entered the store to see what was wrong, saw the T.G.&Y. employees wrestling with their brother and came to his aid. Another struggle ensued. During this struggle Solomon struck Gent and knocked his glasses off, and Alvin shoved Gent. At some point, Gent struck at least one of the plaintiffs with a pistol. Eventually that struggle ended, and plaintiffs and Gent went to a back office in the store.

In a few minutes Lawton police officers Wertz and Dunegan arrived at the store and took plaintiffs into custody. When they arrived at the police station, another altercation occurred. Again, the parties dispute the precise events. Plaintiffs testified that Wertz hit Alvin in the face and pushed his head into a brick wall. Once inside the jail, plaintiffs were subjected to strip searches, allegedly because Wertz and Dunegan found marijuana paraphernalia in Solomon's possession. Plaintiffs were charged with various offenses: petty larceny (Vaughn), assault and battery (Alvin, Solomon, and Vaughn), assault on a police officer (Alvin), damaging private property

(Alvin), resisting arrest (Vaughn and Solomon), disobeying a lawful order (Alvin), and possession of marijuana (Solomon). Seven months later the city dropped all charges and plaintiffs filed this suit. Meanwhile the T.G.&Y. managers checked with the cashier from whom Vaughn bought the hairspray. Although there is a conflict, the evidence overwhelmingly suggests that the cashier believed Vaughn had paid her for the sunglasses and reported this to the T.G.&Y. managers shortly after the incident.

II

The jury found all defendants liable for a violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. The provisions of § 1983 only apply to persons who both deprive others of a right secured by the Constitution or laws of the United States and act under color of a state statute, ordinance, regulation, custom, or usage. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Defendants contend on appeal that one or both of these elements is missing with respect to the Lusbys' claims. The § 1983 liability of the various defendants

rests on separate theories, so we consider each separately.

A

Charles Gent contends that he was not acting under color of state law while employed at the T.G.&Y. store. Alternatively, he contends that if he was so acting he is not liable because he is entitled to a qualified immunity generally accorded to law enforcement officials.

At the time Gent allegedly committed the civil rights violations, he was an off-duty Lawton police officer employed as a part-time security guard at T.G.&Y.'s store in Lawton. Gent was not wearing a police uniform, although he apparently had his police badge with him as well as a Derringer pistol--not a police issue weapon--borrowed from a fellow officer.

We must consider the circumstances under which an off-duty police officer working as a security guard acts under color of state law for purposes of a civil rights claim.[1] In Griffin v. Maryland, 378 U.S. 130 (1964), the Supreme Court found state action when an amusement park security guard who had been deputized as a sheriff of the county, wore a badge, and

identified himself as a deputy sheriff, arrested black park patrons who refused to leave the park in response to his order. The Supreme Court there declared, "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." Id at 135.

The Supreme Court may now apply a somewhat more restrictive test. In discussing the interrelationship of the "state action" requirement of the Fourteenth Amendment and the "color of state law" requirement of 42 U.S.C. § 1983 in another context, the Court described a two-part test for determining whether conduct allegedly depriving a plaintiff of a federal right is fairly attributable to the state: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom tne State is responsible," and (2) the depriving party must be "a person

who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 927 (1982). The Supreme Court proceeded to describe how the concepts of state action and color of state law collapse into each other when the depriving party is one "whose official character is such as to lend the weight of the State to his decision," but are different when the constitutional claim is against a private party. Id. at 941. See also Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.")

There is evidence in the record that both before and after the Lusbys' arrest, defendant Gent was acting as an on-duty police officer. When Gent accosted Vaughn Lusby, Gent flashed his badge and identified himself as a Lawton police officer working as a security guard for T.G.&Y. According to Vaughn, Gent told Vaughn moments after he stopped him that he was going to jail. Gent denied this, but conceded that

he placed Vaughn under arrest on the spot, before Gent had had any opportunity to question Vaughn or other witnesses or ascertain what had happened.[2] After the arrest Gent went to the police station to finish his paperwork on the Lusby incident. He used police documents to get information to complete the citizen's arrest forms. In addition there was evidence suggesting that Gent wanted to file charges against Alvin for assault on a police officer even though Gent was not acting as a police officer at the time he got into an altercation with Alvin and Solomon in the T.G.&Y. store.[3] Griffin and many other cases would appear to treat this as sufficient without more.[4]

If we view Gent as a private person who could be held liable only under the Lugar test, there is sufficient evidence of cooperation with the Lawton police department to conclude that he acted under color of state law. The testimony was that Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them and took them to jail without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest

them. They relied entirely on Gent's word and before he completed a citizen's arrest form. The officers made no independent investigation of the shoplifting, which would have shown that Vaughn Lusby had paid for the glasses. The Lawton police chief testified that the police department routinely did not independently investigate a merchant's allegations of misdemeanor shoplifting before taking into custody suspects the merchant's employees detained through citizen's arrest. In fact, the police department provided T.G.&Y. with special forms prepared for merchants who detained suspected shoplifters which apparently allowed officers the discretion to issue a summons to a suspect when they arrived at the store, without taking the person to jail. Thus, if we treat Gent as a private party, the local police followed a policy that allowed him to substitute his judgment for that of the police. Such cooperative activity between the police department and a private party is sufficient to make Gent a party acting under color of state law.[5]

Mindful of the Supreme Court's declaration in Baker v. McCollan, 443 U.S. 137, 142 (1979),

that not every tort amounts to a deprivation of constitutional rights, we must determine whether a reasonable jury could have found Gent's conduct amounted to a violation actionable under § 1983. Malicious prosecution does not automatically constitute a denial of due process. Nevertheless, if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke § 1983. Norton v. Liddel, 620 F.2d 1375, 1378 (10th Cir. 1980); see also Cline v. Brusett, 661 F.2d 108, 112 (9th Cir. 1981). We believe that when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment. Cf. MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir.), cert. denied, 400 U.S. 852 (1970) ("It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the

events that are also the basis for the criminal charge."); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (condemning agreement in which prosecutor bargained not to press criminal charges if injured party would release police officers from all civil liability).

The plaintiffs presented evidence of several instances of Gent's actions that, viewed as a whole, represent a denial of due process. Gent initially participated in bringing the charges against all three plaintiffs. Gent signed the citizen's arrest forms as well as most of the criminal complaints. Moreover, under Oklahoma law, Gent, as one of the injured parties, could have requested the court to drop those charges for which he received satisfaction. Okla. Stat. Ann. tit. 22, §§ 1291-1294. Thus, Gent could have sought to have the charge of damaging private property dismissed after he received compensation for his broken eyeglasses, which, except for a few clay pots, was the only property destroyed in the T.G.&Y. scuffle. Instead, Gent and T.G.&Y. actively bargained with the Lusbys, seeking a release of

civil liability before they would drop the charges. Such bargaining was outrageous in light of Gent's failure to question the T.G.&Y. cashier to see if Vaughn had paid for the sunglasses, and T.G.&Y.'s managers' knowledge moments after the incident that the cashier remembered selling a pair of sunglasses to a black man, whose face she never looked at, minutes before she sold hairspray to Vaughn Lusby. The latter evidence could have persuaded the jury that Gent and T.G.&Y. knew soon after the incident that the shoplifting charge against Vaughn was groundless, yet both Gent and T.G.&Y. kept this information from the prosecutor so that charges were left pending for over seven months. Therefore, we must uphold the jury's verdict in favor of Vaughn Lusby's § 1983 claim against Gent.

Gent did not initiate the charges against Solomon and Alvin that arose after Wertz and Dunegan took them into custody, and it is not clear that he knew that those charges were groundless. Nevertheless, we conclude that the jury reasonably could have found Gent's conduct in connection with the other charges against

Solomon and Alvin an unconstitutional violation of due process. His failure to seek to have the charges dismissed once he had overwhelming evidence that Vaughn had paid for the sunglasses could be regarded as an egregious case of malicious prosecution. In so holding, we note that Oklahoma law permits suspects reasonably to resist an unlawful arrest by a peace officer who attempts to arrest the suspect for a misdemeanor not committed in the officer's presence. Sandersfield v. State, 568 P.2d 313, 315 (Okla. Crim. App. 1977) (per curiam); Walters v. State, 403 P.2d 267, 275 (Okla. Crim. App. 1965). Relatives of a suspect are privileged to come to the suspect's aid as long as the suspect himself is justified in using self-defense against excessive force by a police officer. Carter v. State, 507 P.2d 932, 933-34 (Okla. Crim. App. 1973). Therefore, the jury could have concluded that Solomon's and Alvin's attempts to free Vaughn from Gent's chokehold were privileged assaults and batteries. Consequently, for Gent and T.G.&Y. to use such charges as a bargaining chip in exchange for a

release of civil liability also violated Solomon's and Alvin's constitutional rights.

Finally, Gent may not escape liability for his constitutional violations by invoking the qualified immunity accorded to state officials. He was not entitled to an instruction on qualified immunity because even if he qualified for such immunity once he slipped into his police role during the T.G.&Y. incident, he forfeited it by acting unreasonably when he investigated the alleged shoplifting. See Allred v. Syarczkopf, 573 F.2d 1146, 1153 (10th Cir. 1978). The law evaluates such conduct primarily by objective standards, determining whether a reasonable person would have known he was violating a constitutional or statutory right. Harolow v. Fitzgerald, 457 U.S. 800, 818 (1982). In this case there is evidence that Gent did not check with the clerk operating the checkout line to see if Vaughn paid for the sunglasses. Moreover, Gent refused to let Vaughn get the cashier's attention at a time when her memory would still have been fresh.

B

The City of Lawton contends that the district court erred in refusing to direct a verdict for the city on plaintiffs' § 1983 claims. A city is not liable under the doctrine of respondeat superior in a § 1983 suit. Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978). Lawton is liable under § 1983 only if the police officers deprived plaintiffs of their constitutional rights pursuant to a policy or custom of the city. See id.

As noted above, the record contains evidence of an impermissible city policy that delegates a nondelegable duty and facilitates private abuse of criminal charges. The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchant designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants

who detained suspected shoplifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.

That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a § 1983 violation. As a result, we need not consider whether the

city's policies for supervising and disciplining its police officers amounted to an unconstitutional procedure, or whether allegations of police officer brutality sufficed to establish a pattern of such misconduct.

C

T.G.&Y. contends that the trial court erred in submitting to the jury plaintiffs' § 1983 claims against it because plaintiffs offered no evidence that T.G.&Y. acted under color of state law. T.G.&Y. is not liable for a civil rights violation simply because it employed Gent. We have held that a private entity that employs an off-duty police officer is not vicariously liable for its employee's deprivations of citizens' civil rights. Draeger v. Grand Central, Inc., 504 F.2d 142, 146 (10th Cir. 1974); see also Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982).

Nevertheless, T.G.&Y. and its managers acted under color of state law within the meaning of § 1983, because they were acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbidden rule or procedure.

See Luger v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Because Lawton's official policy was to not independently investigate citizen allegations of misdemeanors prior to arresting suspects for such misdemeanors, T.G.&Y. had authority to bring its own criminal charges by initiating a citizen's complaint, knowing the city would not exercise any check on such charges. Thus, T.G.&Y. exercised a state inquisitorial right.

Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages. This is the form that T.G.&Y. sought to have the Lusbys sign in order to have the charges

dropped. Accordingly, the jury could reasonably have concluded that T.G.&Y. was liable under § 1983.

D

Officers Wertz and Dunegan assert that the judgments against them based upon § 1983 must be reversed. Wertz and Dunegan do not contest that they acted under color of state law; they do contest the jury's finding that they deprived plaintiffs of a constitutional right.

We have no problems with Alvin Lusby's claims against Wertz and Dunegan based on Wertz' conduct while transporting Alvin to jail. A police officer's use of excessive force is actionable under § 1983 as a constitutional violation. Garrick v. City of Denver, 652 F.2d 969, 972 (10th cir. 1981); see also Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981). The plaintiffs presented ample evidence that Wertz struck Alvin on the face without cause while he was handcuffed outside the Lawton police station and then shoved Alvin head first into a wall on the way into the station. From this evidence the jury could have

concluded that Wertz used excessive force against Alvin.

We find unpersuasive Dunegan's argument that he should not be liable for his failure to stop Wertz' assault upon Alvin. An officer who fails to perform a duty may be liable under § 1983 if that failure causes deprivation of protected rights. McClelland v. Facteau, 610 F.2d at 696. Thus, although Dunegan was not liable merely because he was present at the scene of a constitutional violation, Russ v. Ratliff, 538 F.2d 799, 805 (8th Cir. 1976), cert. denied, 429 U.S. 1041 (1977), he may be liable if he had the opportunity to intervene but failed to do so. Hampton v. Hanrahan, 600 F.2d 600, 626 (7th Cir. 1979) rev'd in part on other grounds, 446 U.S. 754 (1980) (per curiam); Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972). Plaintiffs presented evidence suggesting that Dunegan could have prevented or stopped Officer Wertz' assault on Alvin Lusby. Thus, the trial court properly denied Dunegan's motion for a directed verdict.

With respect to Vaughn's and Solomon's civil rights claims against Wertz and Dunegan, plaintiffs contend the officers conducted an unconstitutional strip search. Wertz and Dunegan, on the other hand, claim they conducted the strip search because they found a roach clip on Solomon and marijuana in the police car, allegedly placed there by one of the plaintiffs while being transported. They also claim to have received information that one of the Lusbys was carrying a large knife. A strip search is not improper when a suspect is going to be placed in the general jail population and has been charged with a drug offense such as possession of marijuana. See Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984). Although defendants presented no supporting evidence about the knife they thought a plaintiff might have or of the marijuana they claimed they found, we believe a reasonable jury could not find that the strip searches were unconstitutional and actionable under § 1983.

Plaintiffs also contend that Wertz' and Dunegan's arrest of plaintiffs at the T.G.&Y. store, based solely on Gent's accusations and

without any independent police investigation to ascertain probable cause, supports the jury's finding of a civil rights violation. Police do not violate the Constitution when they arrest a person relying in good faith on a warrant that appears on its face to be valid but later provide deficient. Baker v. McCollan, 443 U.S. 137, 143-45 (1979). But they do violate the Constitution when they make a warrantless arrest without probable cause. See Draeger v. Grand Central, Inc., 504 F.2d 142, 144-45 (10th Cir. 1974); Patzig v. O'Neil, 577 F.2d 841, 848 (3d Cir. 1978); Duriso v. K-Mart, 559 F.2d 1274, 1277 (5th Cir. 1977) (per curiam); Sartin v. Commissioner of Public Safety, 535 F.2d 430, 434 (8th Cir. 1976); Street v. Surdyka, 492 F.2d 368, 371-73 (4th Cir. 1974). We do not consider Hudson v. Palmer, 52 U.S.L.W. 5052 (U.S. July 3, 1984), and Parratt v. Taylor, 451 U.S. 527 (1981), to require a different holding. Those cases involved deprivation of property, for which state post-deprivation remedies were considered adequate. A false arrest involves a deprivation of liberty; no post-deprivation remedy in the form of damages can

ever fully compensate for time wrongfully spent in custody. See Parratt, 451 U.S. at 545 (Blackmun, J., concurring).

The trial court instructed the jury on the elements of probable cause and on Officer Wertz' and Dunegan's qualified immunity as police officers. There was sufficient evidence from which the jury could conclude that a reasonable police officer in Officer Wertz' and Dunegan's position would have known he was violating the Lusbys' constitutional or statutory rights.[6] Therefore, the trial court acted properly with respect to the claims against Wertz and Dunegan, and we must affirm the jury's verdicts.

III

The City of Lawton and its police officers, Wertz and Dunegan, contend that the trial court erred in failing to dismiss plaintiffs' pendent state law claims against them as barred by the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§ 151-170. Section 156(B) of that act provides,

> "A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with clerk of the governing body of the

> political subdivision within one hundred twenty (120) days after the loss occurs."

Plaintiffs did not give written notice of their claims to the city clerk before they filed this suit.

The Oklahoma courts have not required strict compliance with § 156(B). Instead, as the Oklahoma Supreme Court has emphasized, "The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice." Reirdon v. Wilburton Board of Education, 611 P.2d 239, 241 (Okla. 1980) (footnote omitted). Thus, in Duesterhaus v. City of Edmond, 634 P.2d 720, 723 (Okla. 1981), the court held that the plaintiffs satisfied § 156(B) by verbally notifying the city attorney of their claim against the city and negotiating with him concerning settlement. Although those plaintiffs did not strictly comply with § 156 (B), the court found that they substantially complied with that provision because they gave the city sufficient notice of their claim to fulfill the purposes of the statute: to give the city the opportunity to promptly investigate the claim,

to repair any dangerous conditions, to quickly settle the claim if it was meritorious, and to prepare to meet any potential liability. Id.

Similarly, in this case, Lawton city employees Charles Gent and Eddie Hargraves tried to convince plaintiffs to enter into an agreement whereby plaintiffs would release the private party defendants from civil liability in exchange for dismissing the criminal charges against plaintiffs. As the trial court noted, "Obviously, the City had notice of possible civil claims which might be filed so that they could investigate the claims and determine their validity." Plaintiffs substantially complied with the notice provision within 120 days after they suffered their losses. Indeed, plaintiffs' malicious prosecution claim did not arise until after the prosecutor dismissed the charges against them. See Coleman v. Strong, 105 Okla. 282, 232 P.378, 379 (1925). Thus, as in Duesterhaus, plaintiffs' failure strictly to comply with the requirements of § 156(B) did not undermine the purposes of the statute. Accordingly, we agree with the trial court that

§ 156(B) does not bar plaintiffs' pendent claims.

IV

Gent argues that the trial court erred in permitting plaintiffs to introduce into evidence portions of Gent's police department personnel profile. Gent's psychological profile states, "this man is somewhat suspect in the direction of trying to 'appear good'.... Because of the possibility that Mr. Gent might tend to 'fake good' it may be necessary to observe him rather closely to determine if the personality characteristics noted above are actually a part of him." Plaintiffs' Ex. 17. The City of Lawton Employee Performance Evaluation states that during Gent's initial years of employment he had to "muster his inner resources to gain control of his temper...." Plaintiffs' Ex. 36. Contending that this evidence tends to show that he had a bad temper, Gent argues that the evidence is relevant only to show he acted in conformity with his character when he apprehended the Lusbys, an impermissible purpose under Fed. R. Evid. 404(a). Alternatively, event if the evidence is otherwise

relevant, Gent contends that its prejudicial impact substantially outweighed its probative value. Fed. R. Evid 403.

The statement in Exhibit 17 is not prejudicial. Although the statement in Exhibit tends to show that Gent at one time had a bad temper, it also indicates that Gent controlled it. The record is replete with evidence of Gent's conduct on the day he apprehended the Lusbys. We therefore are convinced that the challenged evidence did not affect the jury's verdict, and that if the trial court erred in admitting the evidence, it was harmless error.

V

The jury found T.G.&Y. liable to Vaughn Lusby on the § 1983 claim and on the pendent claims of false arrest and malicious prosecution. It awarded punitive damages of $50,000 to Vaughn against T.G.&Y.. T.G.&Y. argues that none of its conduct was sufficiently outrageous to warrant the jury's award of punitive damages.

Punitive damages are available in a § 1983 action when a "defendant's conduct is shown to be motivated by evil motive or intent, or when

it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983). The standard for awards in § 1983 actions is essentially the same as that for common law torts. Id. at 48-49, 51; see also id. at 48 n.13 (noting congruence between federal standard in § 1983 actions and Oklahoma standard for punitive damages as described in Smith v. Johnston, 591 P.2d 1260, 1264 (Okla. 1978). In Oklahoma, a jury may award punitive damages for false arrest or malicious prosecution. Moore v. Target Stores, Inc., 571 P.2d 1236, 1240-41 (Okla. Ct. App. 1977). The jury must find that the wrongdoer acted "willfully, wantonly or in reckless disregard of the rights of another, resulting in injury." White v. Conoco, Inc., 701 F.2d 1442, 1448 (10th Cir. 1983).

There is ample evidence in the record from which the jury could have concluded that T.G.&Y. acted with reckless disregard or callous indifference to Vaughn Lusby's rights. T.G.&Y. kept the criminal charges against the Lusbys pending for over seven months even though it knew within minutes of apprehending

Vaughn Lusby that he had paid for the sunglasses that he allegedly shoplifted. Malice is an element of the tort of malicious prosecution, for which the jury found T.G.&Y. liable. Similarly, the thrust of the Lusbys' civil rights claim was that T.G.&Y. abused its position of trust with the city by maliciously prosecuting the Lusbys upon citizen's complaints. Therefore, we must uphold the jury's award of punitive damages.

VI

T.G.&Y. and Gent contend that the trial court erred in instructing the jury on future medical expenses and future loss of earnings, citing Carraco Oil Co. v. Morhain, 380 P.2d 957 (Okla. 1963). In Carraco the court held that there was no basis for the jury to assess future medical expenses for the cost of an operation when the plaintiff did not present any testimony that he would have to undergo the operation. Id. at 959. Nevertheless, the court did not set aside the jury's verdict. Instead, it affirmed but reduced the verdict by an amount representing the maximum cost of the disputed operation. Id. at 961. The following

year, the Oklahoma Supreme Court explained its holding in M.K.&O. Airline Transit Co. v. Deckard, 397 P.2d 888,889 (Okla. 1964), saying that Carraco "did not require to be shown the probable cost of further medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future expenditures. Id. The opinion in M.K.&O. Airline Transit Co. affirmed a jury verdict based on an instruction on future medical expenses when the plaintiff presented a doctor's report stating that the cause of his eye pain had not been determined and that the doctor advised observation and further studies. Id. Plaintiff's daughter, for whom he was also suing, was riding in the automobile when it crashed, and plaintiff presented evidence that she would probably need psychiatric treatment. Id. at 889.

The Lusbys did not present specific evidence suggesting they would require future medical treatment. They did present an expert, Moorman

Prosser, M.D., who testified to some of the possible future physical and mental ailments that plaintiffs may suffer as a result of the T.G.&Y. incident. Dr. Prosser did not discuss even approximate damage amounts or specific courses of treatment. We cannot conclude with reasonable certainty that any of the Lusbys will require future medical care. Therefore, it was error for the judge to instruct the jury about such future medical expenses. Nevertheless, we conclude that it was harmless error that did not affect the jury's determination of damages. Dr. Prosser's testimony did not suggest any particular treatment that plaintiffs would have to undergo. As a result the jury did not hear any facts from which it could have inferred that the Lusbys would incur future medical expenses. The size of the jury awards also indicate that it is unlikely they included any amount for future medical treatment.

We find no error in the court's giving the instruction on impairment of future earnings. Plaintiffs presented evidence that Vaughn's

professional football career may have been impaired and that Solomon and Alvin may have suffered setbacks in seeking employment because of the stigma surrounding their arrest at T.G.&Y. It was up to the jury to weigh the credibility and significance of such evidence.

VII

All defendants argue that the trial court erred in awarding attorney's fees to plaintiffs in excess of the amount provided for in plaintiffs' contingent fee agreement with their attorneys. Our en banc decision in Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983), determined this issue. We there held that a fee award under U.S.C. § 1988 is not limited by a contingent fee agreement between the client and his attorney. Therefore, the trial court did not err in awarding attorney's fees in excess of the amount that plaintiffs' attorneys would have received under the contingent fee agreement.

In view of our affirmance of the award against T.G.&Y. on the § 1983 claims, we need not consider T.G.&Y.'s argument that those claims were so lacking in substance that the

court could not assume pendent jurisdiction over the claims based upon state law. See Mendoza v. K-Mart, Inc., 587 F.2d 1052, 1056-57 (10th Cir. 1979). We also need not consider whether a jury's general verdict for lump-sum damages may be upheld on appeal when the appellate court strikes down one of several bases for liability because we have upheld every basis of liability.

AFFIRMED.

ENDNOTES TO APPENDIX A

[1] In the only case in this circuit involving an off-cuty policeman, Draeger v. Grand Central, Inc., 504 F.2d 142 (10th Cir. 1974), the court assumed, and the parties apparently did not contest, that an off-duty policeman working as a security guard in a department store was acting under color of state law.

[2] Gent's confusion of his private and public roles is evident from his testimony about what information he needed as a private citizen to arrest Vaughn for suspected shoplifting. Vaughn was ultimately charged with violating Lawton Code § 15-104, "Larceny; embezzlement," a misdemeanor offense covering thefts of less than $20. Gent thought he could make a citizen's arrest for a misdemeanor offense not committed in his presence if he had spoken to a reliable witness. Yet actually, Gent's immediate arrest of Vaughn was legal only if Gent was acting as a police officer at the time, and then only if the offense was committed in his presence.

Under Oklahoma law a peace officer may not make a lawful arrest without a warrant for a misdemeanor offense, unless the offense was committed or attempted in his presence. Catron v. City of Ponca City, 340 P.2d 504, 507 (Okla. Crim. App. 1959); see also Okla. Stat. Ann. tit. 22, §§ 196, 202; cf. Utzman v. State, 568 P.2d 641, 642 (Okla. Crim. App. 1977) (describing shoplifting in presence of a peace officer). Presumably an ordinary citizen may not conduct such an arrest either. Oklahoma has modified the law slightly for shoplifting situations so that a peace officer may arrest any person if he has "probable cause for believing [the person] has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner." Okla. Stat. Ann. tit. 22, § 1342. But this statutory exception only applies to peace officers. Cf. Okla. Stat. Ann. tit. 22, § 1343 (authorizing mere detention for a reasonable time by a merchant, his agent or employee). An off-duty police

officer serving as a private security guard must comply with the requirements of a citizen's arrest. Stewart v. State, 527 P.2d 22, 24 (Okla. Crim. App. 1974).

Gent admits that it was difficult for him to distinguish between his police officer duties and his citizen duties. This distinction may have been especially difficult because T.G.&Y. did not make any effort to train Gent about such subtleties prior to allowing him to work as a security officer.

[3] Gent originally signed the complaint against Alvin for assault on a police officer but his signature was later crossed out by Officer Wertz. The stated reason for insisting on handcuffing Alvin behind the back before leaving the T.G.&Y. was that his shoulder injury had not prevented him from hitting a police officer while at the store. Wertz testified in his deposition that he suggested to Gent that he change the assault on a police officer charge to simply assault because Gent was off-duty.

[4] See Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (action under color of state law when bank guard responded to problem as police officer by identifying himself as such and showing his police identification); Davis v. Murphy, 559 F.2d 1098, 1101 (7th Cir. 1977) (action under color of state law when Milwaukee statute provided that police officers were always subject to duty; officers in question identified themselves as police and showed their badges and guns during a brawl they started); Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975), cert. dismissed, 429 U.S. 118 (1976) (action under color of state law when regulation required off-duty police officer to take action "in any type of police or criminal activity" 24 hours a day); Robinson v. Davis, 447 F.2d 753, 758-59 (4th Cir. 1971) (no action under color of state law when plaintiffs knew that college security officials in police uniform were acting as private security guards), cert. denied, 405 U.S. 979 (1972); Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 443 (8th Cir. 1950) (no state action when officer made

no pretense that he was acting under state law).

[5] See El Fundi v. Deroche, 625 F.2d 195, 196 (8th cir. 1980) (action under color of state law when private security guard acted in concert with police officers or pursuant to customary procedures agreed to by police departments); Duriso v. K-Mart, 559 F.2d 1274, 1277 (5th Cir. 1977) (court upheld jury determination of action under color of law when store had a regular form it used to initiate criminal complaint against suspected shoplifters that was part of customary plan with police); Smith v. Brookshire Brothers, Inc., 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam) (action under color of law when police took shoplifting suspects into custody according to prearranged plan whereby police did not conduct an independent investigation of the criminal charges), cert. denied, 424 U.S. 915 (1976); df. White v. Scrivner Corp., 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

[6] In this case the jury found that Wertz and Dunegan had committed false arrests only against Solomon and Alvin; it found for Vaughn on the pendent false arrest claims only against Gent and T.G.&Y. The trial judge's instruction on the elements of the Oklahoma tort of false arrest parallels the elements of a § 1983 violation founded on events involving a false arrest: the police make a warrantless arrest without probable cause. In such circumstances it would seem the jury should have reached the same conclusion on both claims. Such inconsistency does not require reversal of the judgment, however, so long as there is sufficient evidence to support the jury's verdict on the claim on which they found liability. See Malm v. United States Lines Co., 269 F. Supp. 731, 731-32 (S.D.N.Y.), aff'd per curiam, 378 F.2d 941 (2d Cir. 1967).

APPENDIX C: OPINION BELOW

[Denial of Petition for Rehearing entered by United States Court of Appeals for Tenth Circuit on January 9, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY,	)	
Plaintiffs-Appellees,	)	
v.	)	Nos. 82-1721 82-1779
T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN,	)	
Defendants-Appellants.	)	

This matter comes on for consideration of the petitions for rehearing and suggestions for rehearing en banc filed by appellants City of Lawton, Oklahoma, and T.G.&Y. Stores, Inc. in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued

and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX D: OPINION BELOW

[Judgment based on jury verdict entered by United States District Court for the Western District of Oklahoma against Petitioners on December 15, 1981.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

SOLOMON LUSBY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIV-80-751-W
	)	
T.G. & Y. STORES, INC., et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

The jury having found in favor of Plaintiffs and against Defendants in the following amounts, the Court finds that Plaintiffs shall recover of the defendant T.G. & Y. actual and punitive damages of $74,000, and of the defendant Charles Gent $6,000, together with reasonable attorneys' fees of $53,665, against the above named defendants pursuant to 42 U.S.C. § 1988;

THE COURT FURTHER FINDS that upon the jury verdict herein Plaintiffs shall recover of the

defendant City of Lawton, $20,000; the defendant Wertz, $5,000; and the defendant Dunegan $4,000, together with reasonable attorneys' fees of $21,335 against these three defendants pursuant to 42 U.S.C. § 1988.

THE COURT FURTHER FINDS that Plaintiffs are entitled to recover of Defendants expenses of $5,431.49 together with costs to be taxed by the Clerk against the defendants.

IT IS SO ORDERED this 15th day of December, 1981.

/s/ Lee R. West
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 12-15-81

APPENDIX E: TRIAL COURT INSTRUCTIONS

[Jury INSTRUCTION No. 15 relating to "official policy" liability of the municipal petitioner, City of Lawton, Oklahoma, on September 30, 1981, by Lee R. West, trial judge, of the United States District Court of the Western District of Oklahoma.]

Instruction No. 15

LIABILITY OF THE CITY OF LAWTON

If you have found that the plaintiffs were denied any of the civil rights outlined in Instruction No. 11, then you should consider whether the City of Lawton is liable for the denial of the civil right or rights in question.

The standards for assessing liability of the City are different from the standards assessing the liability of an individual person.

If a police officer denies a person his constitutional rights, the town or city that employs that officer is not liable for such a denial or right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Lawton is not liable for the deprivation of plaintiffs' constitutional rights solely because it hired and employed the defendants

Wertz and Dunegan. But there are circumstances under which a city is liable for a deprivation of constitutional rights. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.

This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies or acquiesces in the constitutional deprivations in such a manner that such constitutional deprivations can be found to result from the execution of a city's official policy or custom.

In the circumstances of the case before you, the City of Lawton can be found to have authorized, sanctioned, or acquiesced in any denial of plaintiffs' rights only if an official policy which results in constitutional deprivations can be inferred from informal acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the plaintiff.

It is plaintiffs' contention that such a policy existed and they rely upon allegations that the City is grossly negligent in its

training of police officers, in the lack of continuing training during the course of their employment, and the City's failure to supervise, review, and discipline members of the police force. Plaintiffs allege that the failure of the City to adequately supervise, train, review, and discipline police officers constitutes deliberate indifference to the constitutional rights of the plaintiffs and acquiescence in the probability of serious police misconduct.

The City, of course, denies plaintiffs' allegations and further denies the existence of an official policy of the City of Lawton which results in constitutional deprivations.

The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of offensive acts.

Absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, official policy such as to impose liability on the City of Lawton under the Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force; but a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference: or "gross negligence" on the part of officials in charge.

A municipality or city may not, under the law, assert an affirmative defense of good faith. Accordingly, if the plaintiff proves by a preponderance of the evidence that the City of Lawton knowingly violated plaintiffs' civil rights under this instruction, then you should find for the plaintiffs and against the City without considering any affirmative defense of good faith.